U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, D.C. 20001-8002

Date: April 12, 1999

Case No.1997-INA-357

In the Matter of:

ILLONGO DELICACIES,
Employer,

on behalf of:

ANA MARIA ARISTOZA,
Alien

Certifying Officer: Rebecca Marsh-Day
San Francisco, CA

Appearance: Dan E. Korenberg, Esq.

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

James W. Lawson
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of the alien by the employer under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a) (5)(A) (the Act) and the regulations promulgated thereunder, 20 CFR Part 656. [1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

After the Certifying Officer (CO) of the U.S. Department of Labor (DOL) denied the application, the Employer requested review pursuant to 20 CFR § 656.26.[2]

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application
and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

ISSUES ON APPEAL

Employer seeks to fill the position of Restaurant Cook with DOT Title Cook, Specialty Foreign Food, and job requirements of:

> Prepare, season, and cook authentic specialty foods as offered on restaurant menu. Prepare, measure, and mix ingredients according to traditional Filipino methods and following recipes. Blend ingredients, herbs and spices to create specialty foods and prepare dishes by applying knowledge of proper condiments, serving methods and ingredients. Prepare appetizers, salads, and soups, seafood and traditional entrees such as Pancit, Mami, Kambing, Kare-Kare, Adobo, etc. Prepare traditional Filipino desserts and bake pastries. Insure availability of sufficient supplies and foodstuffs for continued and proper service to customers. Compile list of needed supplies at end of shift. (AF 71)

The application was denied by the CO on the bases of unlawful rejection of U.S. worker, Rosito G. Flores and whether a bona fide job offer existed since the CO raised questions concerning the alien's relationship to the employer and since the employer has held obtaining a tax identification number contingent upon the alien's obtaining labor certification. (AF 12-13). On appeal, employer seeks review of the contentions, among others, that: Mr. Flores was rejected for valid, job-related reasons since he would not commit to the position for more than six months; employer has provided sufficient evidence to prove that he is in need of a full-time cook, because the family members working for the restaurant can only work part-time, as noted

[2]Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

in the CO's Final Determination (AF 7-8); in rebuttal, the Employer adequately proved that the Alien was of no relation to the Employer or anyone affiliated with the restaurant.

DISCUSSION

Review of the issues raised on appeal supports the employer's contentions. It is irrational to require that an employer hire a person such as Flores who stated she would not stay beyond 6 months as she intended to start her own business. This case is distinguishable from the line of cases that hold that mere speculation, suspicion or assumption by the employer is insufficient to justify rejection on the basis that applicant would not remain in the employment. Here, the speculation, suspicion or assumption is that of the CO, rather than the employer, whose affidavit stated:

> Mr. Flores specifically stated that he wanted to open his own import-export business within the next six months and that he did not want to continue working once he opened his business...[H]is own words clearly stated that he only wanted to work for a temporary period of time. We cannot assume that Mr. Flores will work for us for a longer period of time because that would be based upon speculation. (AF 28)

Under the circumstances of this case, it was erroneous for the CO to indulge in the speculation which the employer declined to do.

In the *en banc World Bazaar* case, BALCA held, in the case of an applicant who was deemed overqualified:

> That the applicant would not agree beforehand to remain in the job for at least six months does not mean that he was going to leave in six months, merely that he was keeping his option open. Therefore, Employer has failed to prove that the applicant's employment would not have been permanent.

While Flores agreement to remain for 6 months, considered in a vacuum, might seem to be a stronger basis for denial than that in *World Bazaar*, it is necessary to consider all of the circumstances in any given case. Here, Flores only intended to work on a temporary basis pending the opening of Flores' own import-export business. Flores was not willing to accept permanent employment. Speculation by the CO that he might ultimately work longer does not invalidate the employer's reasonable business judgment in declining to hire an employee whose commitment was temporary and conditional, at best.

On the matter of relationship of the alien to the employer, the FD stated at AF 13:

> Whereas the Notice of Finding directed the employer to indicate whether the alien is related to any family members and to specify the relationship, the employer has only responded so far as to indicate that the alien is not related to the assorted

> family members who are associated with the business, as named by the employer in the rebuttal.
> ****
> Thus we find that the employer is in noncompliance with the request for information as to whether the alien is related to any family members.

The employer's response was a reasonable interpretation of the CO's request in the NOF which in the FD has been expanded to included not only relationship to those engaged in the employer's business, but also relationship to relatives of employer's employees. Clearly, the employer's response was sufficient to demonstrate that there was not a control relationship between the employer and the alien which the employer might reasonably have supposed to be the relevant criterion and the subject of the inquiry. If anything further were reasonably required then it should have been the subject of a Supplemental NOF rather than an additive reason for denial.

The FD attempted to buttress its conclusions on relationship and availability of the opening to a U.S. worker on the statement at AF 13:

> It remains that the employer has put obtaining a tax identification number contingent upon the alien's future permanent residency.

The quoted statement reflects a distortion or at best a misunderstanding of the employer's evidence as recited in the NOF at AF 26:

> The petitioner stated in the same letter that a tax identification number would be obtained "upon approval of alien's permanent residency or upon my hiring of any employees. . ."

The finding in the FD left out the NOF statement of the employer's intention to obtain a tax ID upon the "hiring of any employees". Thus, the FD rationale is contrary to the evidence and NOF and is unsupported.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby ***REVERSED*** and the alien is herewith ***CERTIFIED***.

For the Panel:

_____

JAMES W. LAWSON
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 97 INA 357

[NAME], Employer,

[NAME], Alien

Judges Huddleston and Neusner:

Attached is a re-work of my original grant to include material from my proposed dissent as suggested by Judge Huddleston on reconsideration to concur with the grant.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Neusner			
Huddleston			

Thank you,

Judge Lawson

Date: [DATE]